Mohammad Daud bin Salleh v Kamarudin bin Nordin & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S-21NCVC-2 OF 2011
LEE SWEE SENG JC
16 MAY 2011

Civil Procedure — Declaration — MyKad — Negligence — Same name and number issued to two different persons — Plaintiff suffered damages — Plaintiff sought relief for tort committed against him by public officer — Plaintiff's right to use his original identity card — Application vide writ of summons and statement of claim — Defendants applied to strike out entire writ and statement of claim — Whether disclosed reasonable cause of action — Whether plaintiff's claim essentially for negligence on part of defendants — Whether plaintiff should proceed with judicial review — Rules of the High Court 1980 O 18 r 19 & O 53

In 2005, the plaintiff, a taxi driver, had applied for MyKad at the National Registration Department ('NRD') in Taman Melawati. To his dismay, he was shocked to discover that his application could not be processed as a MyKad had already been issued to him in 2004. In utter disbelief, the plaintiff explained that he had never in 2004 or at any time before applied for MyKad. From the time of discovery that his MyKad had been issued to someone else, the plaintiff's quiet equanimity was disrupted by a series of shocking discoveries. For example, in 2007 he received a notice from Jabatan Pengangkutan Jalan ('JPJ') regarding a car registered under the registration No WLY 3910 that was driven exceeding the speed limit allowed. Apparently, the car had been registered in his name and the purchase was with a loan from Public Finance Bhd. Subsequently, the plaintiff was informed by AmBank that he had defaulted in the payment of RM5,000 for a car registered as BDF 5959 which was again not his car. Thereafter, the plaintiff received a notice from Majlis Perbandaran Klang to pay a compound of RM50 for car No WLY 3910. The plaintiff also received a notice from Majlis Perbandaran Kota Bahru for a compound of RM100. Further, the plaintiff found that his name had been blacklisted by central credit referencing and information service ('CCRIS') set up under the auspices of Bank Negara and also by companies providing credit referencing service. On 6 November 2009, the NRD informed the plaintiff that his old identification card ('IC') No of 690101–08–8023 had been invalidated and that he was to collect his new IC bearing No 600101–36–6011. The plaintiff contended that he had never given consent to allow the NRD to change his IC number. Hence, this action by the plaintiff against the first defendant, the former Director General of the NRD who had issued the IC to him, the Director General of the NRD as the second defendant, the Ministry of Home Affairs as the third defendant and the

Government of Malaysia as the fourth defendant. He prayed, inter alia, for a declaration that he had the right to use his original identity card number; an order that the NRD reactivate the usage of IC No 690101–08–8023 to him only; general/aggravated damages and special damages. The defendants had applied to strike out the plaintiff's claim under O 18 r 19 of the Rules of the High Court 1980 ('RHC') on the ground that the writ of summons and statement of claim did not disclose a reasonable cause of action and also that the claim was an abuse of the process of the court. The defendants contended that the plaintiff ought to have applied for a judicial review under O 53 of the RHC as in essence, the plaintiff's claim was for a review of the action of the first defendant in issuing two IC's with the same name and number to two different persons.

Held, dismissing the defendants' application with costs in the cause:

(1) The aggrieved party was seeking relief for a tort committed against him by a public officer, and the procedure to take action was by way of writ. In this present case, the defendants had negligently issued to another person, an identification card which had the same number as the plaintiff. The plaintiff suffered and continued to suffer as a result of the defendants' alleged negligence (see para 30).

(2) Where the claim of the plaintiff emanates from an alleged negligent act of the defendants, one can then surmise that the source of the complaint was a private law matter and though the remedy might have a trace of a public law remedy in it, for example, an order for the NRD to reactivate the usage of his first IC number, it is only peripheral and not the pith and substance of the plaintiff's claim. The core of the plaintiff's claim was substantially founded on the tort of negligence bringing with it a wake of problems and a woeful one at that to the plaintiff who todate had not understood why he should be the victim of somebody's action or inaction at the NRD to say the least (see para 34).

(3) As the plaintiff's claim was predominantly that of a private law claim and remedy under the tort of negligence, to strike it out at this stage would do a grave injustice to the plaintiff. The plaintiff's claim was primarily and particularly premised on the tort of negligence. It should proceed to trial and be decided on merits. The court could not in all honesty strike out the plaintiff's claim as disclosing no reasonable cause of action and/or that it was an abuse of the court's process (see para 40).

[Bahasa Malaysia summary

Pada tahun 2005, plaintif, seorang pemandu teksi, telah memohon MyKad di Jabatan Pendaftaran Negara ('JPN') di Taman Melawati. Namun dia kecewa dan terperanjat apabila diberitahu bahawa permohonannya tidak boleh diproses kerana MyKad telahpun dikeluarkan kepadanya pada tahun 2004.

Berasa tidak percaya, plaintif menjelaskan bahawa dia tidak pernah pada tahun 2004 atau pada bila-bila masa sebelum itu memohon MyKad. Sejak mengetahui bahawa MyKadnya telah dikeluarkan kepada orang lain, sikap tenang plaintif tercabar akibat beberapa siri penemuan yang memeranjatkan. Contohnya, pada tahun 2007 dia telah menerima notis daripada Jabatan Pengangkutan Jalan ('JPJ') berkaitan sebuah kereta berdaftar di bawah No Pendaftaran WLY 3910 yang telah dipandu melebihi had laju yang dibenarkan. Nampaknya, kereta itu telah didaftarkan atas namanya dan belian itu dibuat melalui pinjaman daripada Public Finance Bhd. Berikutan itu, plaintif diberitahu oleh Ambank bahawa dia telah gagal membuat bayaran RM5,000 untuk kereta yang didaftarkan sebagai BDF 5959 yang juga bukan keretanya. Selepas itu, plaintif menerima notis daripada Majlis Perbandaran Klang agar membayar kompaun RM50 untuk kereta No WLY 3910. Plaintif juga menerima notis daripada Majlis Perbandaran Kota Bahru untuk kompaun RM100. Selanjutnya, plaintif mendapati bahawa namanya telah disenaraihitam oleh sistem maklumat rujukan kredit pusat ('CCRIS') yang ditubuhkan di bawah naungan Bank Negara dan juga oleh syarikat-syarikat bagi memberikan khidmat rujukan kredit. Pada 6 November 2009, JPN telah memberitahu plaintif bahawa kad pengenalan lamanya ('KP') No 690101–08–8023 telah menjadi tidak sah dan agar dia mengambil KP barunya No 600101–36–6011. Plaintif menegaskan bahawa dia tidak pernah bersetuju untuk membenarkan JPN menukar nombor KPnya. Justeru itu, tindakan ini telah diambil oleh plaintif terhadap defendan pertama, bekas Ketua Pengarah JPN yang telah mengeluarkan KP itu kepadanya, Ketua Pengarah JPN sebagai defendan kedua, Kementerian Hak Ehwal Dalam Negeri sebagai defendan ketiga dan Kerajaan Malaysia sebagai defendan keempat. Dia memohon, antara lain, untuk satu deklarasi bahawa dia mempunyai hak untuk menggunakan nombor KP asalnya; satu perintah agar JPN mengaktifkan semula penggunaan KP No 690101–08–8023 kepadanya sahaja; ganti rugi am/teruk. Defendan-defendan telah memohon untuk membatalkan tuntutan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa writ saman dan penyataan tuntutan tidak menunjukkan kausa tindakan munasabah dan juga bahawa tuntutan itu merupakan satu penyalahgunaan proses mahkamah. Defendan-defendan berhujah bahawa plaintif sepatutnya telah memohon untuk semakan kehakiman di bawah A 53 KMT kerana intipatinya, tuntutan plaintif adalah untuk semakan tindakan defendan pertama mengeluarkan dua KP yang mempunyai nama dan nombor sama kepada dua orang berbeza.

Diputuskan, menolak permohonan defendan-defendan dengan kos dalam kausa:

(1) Pihak yang terkilan di sini memohon relief bagi tort yang dilakukan terhadapnya oleh pegawai awam, dan prosedur untuk mengambil tindakan adalah melalui writ. Dalam kes ini, defendan-defendan telah

dengan cuai mengeluarkan kepada seorang lain, satu kad pengenalan yang mempunyai nombor yang sama seperti plaintif. Plaintif telah menanggung kesengsaraan dan terus sengsara akibat daripada dakwaan kecuaian defendan-defendan itu (lihat perenggan 30).

(2) Di mana tuntutan plaintif datangnya daripada dakwaan tindakan kecuaian defendan-defendan, seseorang itu boleh mengagak bahawa sumber aduan adalah satu perkara undang-undang persendirian dan meskipun remedi itu mungkin terdapat sedikit remedi undang-undang awam dalamnya, contohnya, satu perintah agar JPN mengaktifkan semula penggunaan nombor KP pertamanya, ia tidak berapa penting dan bukan intipati dan isi hal tuntutan plaintif. Teras tuntutan plaintif pada asasnya berdasarkan undang-undang tort akibat kecuaian yang telah menimbulkan masalah lain dan amat menyedihkan kerana plaintif sehingga kini tidak memahami kenapa dia patut menjadi mangsa tindakan atau tindakan yang tidak diambil oleh seseorang di JPN (lihat perenggan 34).

(3) Oleh sebab tuntutan plaintif lebih banyak kepada tuntutan undang-undang persendirian dan remedi di bawah undang-undang tort kerana kecuaian, untuk membatalkannya di peringkat ini akan mengakibatkan ketidakadilan kepada plaintif. Tuntutan plaintif pada amnya dan khususnya berasaskan tort kecuaian. Ia patut diteruskan dalam perbicaraan dan diputuskan atas merit. Mahkamah ini tidak boleh membatalkan tuntutan plaintif kerana tidak menunjukkan kausa tindakan munasabah dan/atau terdapat penyalahgunaan proses mahkamah (lihat perenggan 40).]

Notes

For cases on declaration generally, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2516–2585.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Ghozi Abu Bakar v Majlis Angkatan Tentera & Anor [2006] 4 CLJ 291, HC (distd)

Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105; [1984] 2 CLJ 88, FC (refd)

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)

O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124, HL (refd)

Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia [2005] 4 AMR 80, HC (distd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651, CA (refd)
See Teow Chuan & Anor v YAM Tunku Nadzaruddin ibni Tuanku Jaafar & Ors [1999] 7 CLJ 195, HC (refd)
Subramaniam Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors [2003] 6 CLJ 175, HC (distd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661; [1996] 1 CLJ 393, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 18 19(1)(a), (1)(d), O 53 rr 2(1), O 33 r 2, O 53, (4), 3(1), (2), (3), (6), 4(1)
Specific Relief Act 1950 s 41

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Mohd Zaidan Daud (Yusfarizal Yussoff with him) (Zulpadli & Edham) for the respondent/plaintiff.

Lee Swee Seng JC:

PROLOGUE

[1] The plaintiff is a taxi driver. Life has not been a particularly smooth cruise for him and especially after his shocking discovery in 2005 when he went to the National Registration Department ('NRD') in Taman Melawati to apply for his MyKad. There he was told by the officer that his application could not be processed as a MyKad had already been issued to him in 2004, apparently from the NRD record. In utter disbelief, the plaintiff explained that he had never in 2004 or at any time before applied for MyKad.

[2] It took him quite awhile to absorb and appreciate the melange of mess that would soon mark his life, not of his own making.

PROBLEMS

[3] He went to the NRD in Putrajaya for he thought he was entitled to an explanation and there he was interrogated by the officers from the Ministry of Home Affairs. He was shown a photo of a MyKad that was not of him. He waited for an official response from the NRD in Putrajaya and the Ministry of Home Affairs as promised by them but to no avail.

[4] In 2007 he received a notice from Jabatan Pengangkutan Jalan ('JPJ') regarding a car registered under the No WLY 3910 that was driven exceeding the speed limit allowed. The plaintiff was shocked as the car was not his. He went to the JPJ office to get an explanation and there he was shown a photo that was not him. The officer there by the name of Encik Zainur Lili promised to reply him officially but again no response came. His problem had only begun!

[5] Apparently the car had been registered in his name and the purchase was with a loan from Public Finance Bhd. On 18 January 2008 he went to Bank Negara to make a complaint that he had not taken such a loan facility. On the same day he also went to Public Finance Bhd to complain about the fact that someone had used his IC for the purpose of the facility but he did not receive any official response.

[6] He was disturbed within and did not know when the next surprise of a sinister kind, would appear. On 25 April 2008 he made his way to the Bukit Aman Police Headquarter and saw an investigation officer Tuan Krishnan of the Commercial Crime Unit and again did not receive any official response.

[7] He said it was severely stressful for him from that time of discovery that his MyKad had been issued to someone else for he would not know when his quiet equanimity would be disrupted by another shocking discovery. Sure enough, on 29 July 2008, when he was resting in his home at about 10.30pm, there came two Malay men who introduced themselves as Encik Abang Md Nor and Encik Aris. One of them handed him a copy of an IC and a copy of the ownership registration card for vehicle WLY 3910. The documents showed his name and IC No but the face and the address are not his. The false IC showed that it had been issued by the JPN on 30 September 1991 and that it had been signed by the first defendant as the Director General of National Registration. The motor vehicle registration card showed that the owner is the plaintiff with the correct IC No but the reality of the matter, as narrated by the plaintiff, in his statement of claim, is not he has never bought the car or for that matter taken the facility from Public Finance Bhd.

[8] It transpired that the strangers who came by the night had wanted to renew the car's road tax as one of them had bought the car from a third party and the road tax could not be renewed as the car was still in the name of the plaintiff.

[9] The plaintiff proceeded to lodge a police report on 2 August 2008 at the Setapak Police Station, Kuala Lumpur that his IC had been used by another person.

[10] On 16 March 2009 he received a phone call from AmBank informing him that he had defaulted in payment of a car registered as BDF 5959 which was again not his car! The amount outstanding then was RM5,000. It looks like life will never be the same for him again.

[11] Sure enough he was to receive a notice from Majlis Perbandaran Klang dated 15 April 2009 to pay a compound of RM50 for car No WLY 3910. Then again another notice this time from Majlis Perbandaran Kota Bahru dated 13 September 2009 this time for a compound of RM100.

[12] According to his counsel, Encik Mohd Zaidan Daud, he found his name being blacklisted by central credit referencing and information service ('CCRIS') set up under the auspices of Bank Negara and also by companies providing credit referencing service.

[13] On 19 October 2009 he appointed Messrs Karpal Singh & Co to represent him to resolve the matter and the said solicitors issued a show cause letter to the NRD and the reply was that the matter was under investigation.

[14] On 6 November 2009 NRD informed him that his old identification card ('IC') No of 690101–08–8023 had been invalidated and that he was to collect his new IC bearing No 600101–36–6011. The plaintiff contended that he had never given consent to allow the NRD to change his IC No and until now he refused to collect the new IC with a new IC No.

[15] His children's birth certificates, his marriage certificate and all important documents have his original IC No and to him it was certainly not a simple case of having a new IC No and starting over a new leaf.

PARTIES

[16] At his wits' end, he sued the first defendant, the former Director General of National Registration who had issued the IC to him, the Director General of JPN as the second defendant, the Ministry of Home Affairs as the third defendant and the Government of Malaysia as the fourth defendant.

PRAYERS

[17] In the plaintiff's action begun by writ he had set out the salient facts that had led to his predicament and he prayed for the following reliefs:

(a) a declaration that he has the right to use his original identity card No 690101–08–8023;

(b) a declaration that he is the only person who has the right to use the said identity card;

(c) an order that the NRD reactivate the usage of ID No 690101–08–8023 to him only;

(d) special damages;

(e) general/aggravated damages;

(f) costs; and

(g) such further and other reliefs deemed fit by the court.

[18] The defendants having entered an appearance had applied to strike out the entire writ and statement of claim vide their summons in chambers dated 17 February 2011 under O 18 r 19 of the Rules of the High Court ('RHC') and in particular under limb (a) in that the writ of summons and statement of claim do not disclose a reasonable cause of action and also under limb (d) in that the claim is an abuse of the process of the court in that the plaintiff ought to have applied for a judicial review under O 53 of the RHC as in essence the plaintiff's claim is for a review of the action of the first defendant in issuing two ICs with the same name and number to two different persons. The defendants had not filed any defence yet.

PRINCIPLES

[19] In considering an application to strike out under O 18 r 19 of the RHC, I bear in mind the principle enunciated by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 where at pp 43–44 it states:

> The principles upon which the court acts in exercising its powers under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in *plain and obvious cases* that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86 at p 91) and this summary procedure can only be adopted when it can be clearly seen that *a claim or answer is on the face of it 'obviously unsustainable'* (*Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and the facts of the case, in order to see whether a party has a cause of action or a defence (*Wenlock v Moloney and others* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 2 (which is in pari material with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

[20] Again in the Court of Appeal case of *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 at p 679; [1996] 1 CLJ 393 at pp 409–410 the Court of Appeal in reversing the decision of the High Court in refusing to strike out under O 18 r 19 of the RHC cautioned that:

> A 'cause of action' is the entire set of facts that gives to an enforceable claim; the phrase comprises every fact which if traversed, the (respondent) plaintiff must prove in order to obtain judgment;
>
> What may be 'plain and obvious' to a specialist in company law may not be so to another who does not have this specialised knowledge. The standard is an objective one and implies that the perception required is that of a person who has the required expertise. The court may strike out a claim even though it required a long and elaborate hearing before the court was satisfied that there was no cause of action.

[21] Fortunately for the court, the matrix of facts as narrated that had caused a melange of mess to the plaintiff is not an area of law that requires specialised knowledge when one looks at the quintessence of the plaintiff's claim which essentially is a claim for negligence on the part of the defendants in having issued an IC bearing the same number to two different persons. The particulars of negligence on the part of the defendants have been particularised. Even if the defendants were to contend that the plaintiff's claim is weak, that itself is not a good ground for striking out the plaintiff's claim. As was said by the Federal Court in the case of *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105; [1984] 2 CLJ 88:

> It cannot be gainsaid that under O 18 r 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87.

[22] The learned authors Zamir and Woolf in their book entitled *The Declaratory Judgment*, (3rd Ed) at p 262 said:

> The general rule is that it is desirable that all persons who appear to have a real interest in objecting to the grant of a declaration claimed in legal proceedings should be made defendants.

[23] Further in *See Teow Chuan & Anor v YAM Tunku Nadzaruddin ibni Tuanku Jaafar & Ors* [1999] 7 CLJ 195, Low Hop Bing J (as he then was) held at p 202 that in an action where the plaintiff's claim was substantially for declaratory reliefs, no cause of action need to be disclosed:

A The plaintiffs' claim is substantially for declaratory reliefs. In my view, it is settled law that where declaratory reliefs are sought, no cause of action need to be disclosed. By way of illustration, in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177, the Federal Court held, inter alia, that it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, so long as he is somebody with such an interest in the subject matter of the action as to justify his seeking relief.

[24] The Federal Court in a language crisp and clear said in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 at p 178:

> Although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, 'he must be somebody with such an interest in the subject matter of the action as to justify his seeking relief' (*Wilson, Walton International (Offshore Services), Ltd v Tees and Hartlepools Port Authority* [1969] 1 Lloyd's Rep 120 (at p 124)). *A private individual may sue for a declaration if he has a cause of action at common law or to protect a statutory right, or if he suffers or will suffer special damage as a result of the defendant's action*. In *Stockwell v Southgate Corporation* [1936] 2 All ER 1343 at p 1351 Porter J, said (at p 1351) that the test was whether the plaintiffs were 'peculiarly affected'.
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> The locus classicus of course on this aspect is *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at p 114 where Buckley J, laid down (at p 114) a formula which has been treated with the respect generally reserved for statutes in relation to the conditions which must be satisfied before a private person can claim an injunction to protect a public statutory right:
>
> > A plaintiff can sue without joining the attorney general in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with …; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. (Emphasis added.)

[25] Here, the plaintiff's action is in the common law action of the tort of negligence for the damage suffered by him arising out of a breach of a duty of care owed to him by the defendants.

[26] The dichotomy and distinction between what is a public law remedy and a private law remedy had been clarified in the speech of Lord Diplock in the House of Lords decision of *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124:

> A person seeking to establish that a decision of public authority infringes right which he is entitled to have protected under public law must as a general rule proceed by way of an application for judicial review under O 53 rather than by way of an ordinary action.

and at p 1133:

> Order 53 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceedings by way of an application for judicial review, and whichever remedy is found to be to be the most appropriate in the light of what has emerged on the hearing of the application, can be granted on him. If what should emerge is that his complaint is not an infringement of any of his rights that are entitled to protection in public law, but may be *an infringement of his rights in private law and thus not a proper subject for judicial review* … (Emphasis added.)

[27] His Lordship also lamented a common abuse though of the reverse type at p 1134:

> It would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities.

[28] A cursory survey of the taxonomy of the plaintiff's claim followed by a more careful scrutiny of it show that the plaintiff by way para 33 of his statement of claim had crafted his claim on negligence of the defendants with particulars thereof set out. By para 34 thereof the plaintiff had ventured to plead a conspiracy to injure and/or a conspiracy to defraud — though whether the plaintiff can succeed in this is a different matter altogether. The remedy is unmistakably a private law remedy and to proceed with a judicial review under O 53 of the RHC would, contrary to the contention of the defendants, be an abuse of the process of the court!

[29] If this area of law has been assailed by doubts and assaulted by some diffused differentiation in the private law-public law dichotomy, then one must especially welcome the Federal Court in its timely decision in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865. It has the salutary effect of not just merely dispelling doubts but more significantly of declaring once again the true position of the law in the continuing private law-public law debate. I must quote in extenso the speech of His Lordship James Foong FCJ at pp 896–897:

> Aside from mandamus, prohibition, quo warranto and certiorari, or any others described under the pre-amended O 53 of the RHC, an alternative remedy for an aggrieved party seeking relief against a public authority on his infringed right to which he was entitled to protection under public law is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But s 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O 15 r 16 of the RHC also provides the

A High Court with such power (see Lord Diplock's judgment in *O'Reilly v Mackman*). However, O 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a B general rule all such application for such relief must commence according to what is set down in O 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court. This general rule enunciated in *O'Reilly v Mackman* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* and repeated in *YAB Dato' Dr Zambry*. However, like all general rule, there are exceptions. This again was recognised by Lord Diplock in C *O'Reilly v Mackman* where he referred to 'particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons'. *Then of course there is the exception for a claim against the public authority for negligence as* decided in *Majlis* D *Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*. There may be others and these 'are left to be decided on a case to case basis' as spoken of by Lord Diplock in *O'Reilly v Mackman*. The circumstances in *YAB Dato' Dr Zambry* is obviously one of them where this court found that a challenge by the appellants of their suspension from attending a State Legislative Assembly is a matter that affects their legal status E is an exception. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O 53 of the RHC. (Emphasis added.)

F **[30]** Here, the aggrieved party is seeking relief for a tort committed against him by a public officer, the procedure to take action is by way of writ. In this present case, the defendants had negligently issued an identification card which has the same number as the plaintiff to another person. The plaintiff had suffered and continues to suffer as a result of the defendants' alleged negligence. G What the plaintiff in his simple mind is saying is this: 'This is a strange situation where two persons have the same IC No. It should not have happened. Someone has stolen my identity! As this has happened I am saying the defendants have been negligent and I have good reasons to say that. It is for them to tell the court and to show to the court that they have not been H negligent.'

[31] On the face of it I cannot in all honesty say that the plaintiff has no reasonable cause of action in negligence. Under limb (a) of O 18 r 19(1) one must assume everything pleaded to be correct and ask oneself the question: is I there a reasonable cause of action? In that sense there is no need for an affidavit to be filed in support and there was none in the defendants' application here. Support for this proposition is found in the Court of Appeal case of *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192 at p 200 where His Lordship Low Hop Bing JCA said:

In considering the defendants ground under O 18 r 19(1)(a), ie *that the plaintiff's pleading discloses no reasonable cause of action*, we do not have to look at the affidavits as no such evidence shall be admissible: O 18 r 19(2). We must consider only the pleadings for the purpose of determining whether, in the instant appeal, the plaintiff's statement of claim discloses a reasonable cause of action. The expression reasonable cause of action means simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person: per Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at p 242; [1964] 2 All ER 929 at p 934. The test to be applied is whether on the face of the pleadings, the court is prepared to say that the cause of action is obviously unsustainable: see eg *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (FC); and *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC).

[32] As was observed some time ago in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1 the Federal Court speaking through His Lordship Steve Shim CJ (Sabah and Sarawak) at p 412 (MLJ); p 28 (CLJ) said:

The respondents' claim for negligence by way of writ action is perfectly proper in law. In my view, the Court of Appeal has erred in holding that the respondents' only recourse against MPAJ lay in the area of public law by way of judicial review. I may add that at the time the respondents filed this present action, the public law remedy of judicial review under O 53 of the Rules of High Court 1980, did not permit the recovery of damages. Hence, *it is not inappropriate for the respondents to proceed by way of writ action which they did*. (Emphasis added.)

[33] The defendants submitted that under the new O 53 of the RHC, an application to challenge a decision of a public authority shall be made under the said O 53. In the present case, the defendants are Kamarudin bin Nordin (the former Director General of National Registration), Director General of National Registration, Ministry of Home Affairs and the Government of Malaysia and therefore it is very clear that the defendants are 'public authorities' as provided under O 53 r 2(4) of the RHC 1980. There are certain requirements under the order that need to be adhered to by an applicant which are as follows:

(a) the applicant shall be a person or body who is *adversely affected by the decision* within the ambit of the O 53 r 2(4);

(b) the applicant shall show to the court that he at least has a *prima facie arguable case*;

(c) a *decision* within the ambit of O 53 r 2(4) has been made;

(d) the said decision was made by a *public authority* within the ambit of the same O 53 r 2(4);

(e) the applicant shall file the application for judicial review *within 40 days* from the date when grounds for the application first arose or when the decision is first communicated to the applicant as required under O 53 r 3(6);

(f) the application shall be made in *Form 111A* as provided under O 53 r 2(1);

(g) the applicant shall file *an application for leave* for judicial review, a statement and affidavit within *40 days* as required in O 53 r 3(1), (2) and 3(6);

(h) the applicant shall *serve* the application for leave, the statement and the affidavit to the attorney general chambers *not less than three days* before the hearing for leave as required under O 53 r 3(3);

(i) if the leave is then granted, the applicant shall, *within 14 days* after the grant of such leave, file Form 111B as required under O 53 r 4(1);

(j) upon extraction of the sealed copy of Form 111B, the applicant shall, *not less than 14 days* before the hearing date, *serve* it together with the substantive application for judicial review, the statement and the affidavit to all persons directly affected by the application. (Emphasis added.)

[34] It cannot be gainsaid that O 53 of the RHC was designed for the protection of public authorities against what may be frivolous challenge to a policy decision of a public authority made in good faith. Hence the requirement for service of the application for leave on the learned attorney general who may even decide to appear at leave stage to object to the application as has been done on a number of instances. However where the claim of the plaintiff emanates from an alleged negligent act of the defendants, one can then surmise that the source of the complaint is a private law matter and though the remedy might have a trace of a public law remedy in for example an order that the NRD reactivates the usage of his first IC No, that is only peripheral and not the pith and substance of the plaintiff's claim. The core of the plaintiff's claim is substantially founded on the tort of negligence bringing with it a wake of problems and a woeful one at that to the plaintiff who to date has not understood why he should be the victim of somebody's action or inaction at the NRD to say the least.

[35] The plaintiff suffering a genuine grievance against the defendants had managed to summon some resources to engage counsel to knock on the court's door by paying the necessary filing fees. The court's door has been opened for him to pursue his remedy. However the defendants now say he should not have been allowed to open the court's door at all for he has abused the court's process in not abiding by O 53 of the RHC. They are asking for his action to be struck out in limine. The plaintiff has barely begun to speak and should he be shut out

completely once and for all at this early stage of proceeding? Should he not be allowed to prosecute his claim irrespective of his chances of succeeding finally? What had happened to the plaintiff, a taxi driver though he may be, could well have happened to anyone, irrespective of our stature and standing in society. It is for him the plaintiff to show how the defendants had been negligent. The remedy of a declaration is discretionary and the court at the end of the day, even if it should agree with him, might not allow him the remedy of a declaration other than perhaps damages to be assessed should the defendants be found to have been negligent. As was pointed out by His Lordship Gopal Sri Ram JCA (as he then was) in *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651:

> It is beyond dispute that the remedy of declaration is discretionary in nature … Although s 41 of the (Specific Relief Act 1950) is not a complete code upon the subject of declaratory decrees (*Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal* [1995] 2 MLJ 620) and the power to make a declaration is almost unlimited (*Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490 at p 507 per Lord Sterndale MR), yet, the remedy of declaration may be refused upon settled principles. Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41) or upon an issue of no practical consequence (*Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and another* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor; Tan Kim Chua Realty (M) Sdn Bhd v Lye Thai Sang & Anor* [1985] 2 MLJ 380) or other inequitable conduct (*City of London v Horner* (1914) 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (*Trawnik and another v Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v Griffiths* [1924] 1 KB 941 at p 960). We wish to make in plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.

[36] That is a separate matter altogether and to deny him the right to be heard on merits in a court of law would perhaps reinforce in his mind a common perception that the law is steeped against the poor whose lot is an endless toil under the sweltering heat and the sultry sun, eating his rice by the sweat of his brow.

[37] If at all one of the remedies prayed for has a public element to it, then I recall the words of His Lordship James Foong FCJ in *Ahmad Jefri*'s case at p 172 (MLJ); p 898 (CLJ):

> If it (the claim) is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under

private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable.

[38] The defendants argued that the new O 53 of the RHC vide PU(A) 342/2000 has brought about a total change in the legal landscape of judicial review in that an application under the new O 53 is now called an application for judicial review which is different from the old provision which was limited to 'prerogative orders'. Senior federal counsel, Puan Suhaila Haron, submitted that the reliefs now include declaration and injunction. With respect, I take the view that the introduction of the nomenclature 'judicial review' was more in line with the changes in the UK Civil Procedure Rules to do away with archaic and anachronistic terms that only lawyers understand and so can impress laymen with the pomposity of their language, pandering to the perception that theirs is a very learned profession. In UK the different nomenclature of 'writ, originating summons, motion and petition' is now being replaced with 'claim or application'. So too in Singapore in their Rules of Court, the previously four modes of originating process is reduced to just two: writ and originating summons. A petition for admission as an advocate and solicitor is now by originating summons and so is an application for winding up.

[39] However I do take the point that where the reliefs and remedies are essentially challenging the action of a public authority then it would be an abuse of the court's process to circumvent the steps required under O 53 of the RHC and to substitute therefore the less stringent provision of O 15 r 16 of the RHC by including a prayer for a declaration in a writ or originating summons action. In that sense the cases of *Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia* [2005] 4 AMR 80, *Subramaniam Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors* [2003] 6 CLJ 175 and *Ghozi Abu Bakar v Majlis Angkatan Tentera & Anor* [2006] 4 CLJ 291 cited by senior federal counsel in support of her contention can all be distinguished.

PRONOUNCEMENT

[40] I have no difficulty for the reasons given above to hold that the plaintiff's claim is predominantly that of a private law claim and remedy under the tort of negligence and to strike it out at this stage would do a grave injustice to the plaintiff. I would further add that the plaintiff's claim here is primarily and particularly premised on the tort of negligence. It should proceed to trial and be decided on merits. I cannot in all honesty strike out the plaintiff's claim as disclosing no reasonable cause of action and/or that it is an abuse of the court's process.

[41] I had therefore dismissed the defendants' application with costs in the

cause.

POSTSCRIPT

[42] As this is an NCvC case, standing for New Civil Court case which is targeted for disposal within nine months from date of filing which was 4 January 2011, I am hopeful that the problems faced by the plaintiff might be resolved and solved by the end of September 2011 with the court's powers to grant consequential reliefs including declaratory ones if the plaintiff can prove his claim on a balance of probabilities and if the declarations prayed for are necessary, feasible and appropriate.

Defendants' application dismissed with costs in the cause.

Reported by Ashgar Ali Ali Mohamad